

COMMITTEE FOR IDAHO'S HIGH DESERT ET AL.

IBLA 89-74

Decided

Appeals from a decision of the Medicine Lodge Resource Area Manager, Bureau of Land Management, to acquire an easement for public access and to enter a lease of private lands for a parking area and campground. ID-030-8-68.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Federal Land Policy and Management Act of 1976: Wilderness--Rights-of-Way: Federal Land Policy and Management Act of 1976--Wilderness Act

No violation of the nonimpairment standard set forth in sec. 603(c) of the Federal Land Policy and Management Act of 1976 occurs upon BLM's decision to acquire an easement and lease of private lands located outside WSA boundaries which would provide ORV access within the WSA.

APPEARANCES: Jane Leeson, Regional Associate, The Wilderness Society, Boise, Idaho, for appellants; Robert S. Burr, Esq., Office of the Solicitor, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Committee for Idaho's High Desert, Idaho Natural Resources Legal Foundation, and The Wilderness Society have appealed from a decision of the Medicine Lodge Resource Area Manager, Bureau of Land Management (BLM), dated September 20, 1988, to acquire an easement for public access to the St. Anthony Sand Dunes and to lease private lands adjacent to the Sand Mountain wilderness study area (WSA) to provide a site for parking and a campground. The easement and lease sites are both located outside WSA boundaries on private lands in sec. 3, T. 7 N., R. 39 E., Boise Meridian, Fremont County, Idaho. The St. Anthony Sand Dunes are located on public land within the WSA.

The Area Manager's decision to enter negotiations for the easement and lease followed preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) with respect to the proposed action. It was noted in the EA that the proposed action is occasioned by a private landowner's closure of the primary access route to the dunes. The purpose of the proposed action is to replace the former access route and focus parking and camping in areas outside the WSA.

Appellants object to BLM's decision claiming that the contemplated improvements would encourage and legitimize unlawful activity. The activity appellants regard as unlawful is off-road vehicle (ORV) use within the WSA. According to appellants, this use violates section 603 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. | 1782 (1982), which requires the Secretary to manage WSA lands, inter alia, in a manner "so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of the Act." (Emphasis added.)

Alternatively, appellants contend that BLM erred in allowing ORV use to increase from 1,000 Visitor Use Days per year to 5,000 Visitor Use Days per year during the present interim management period. Appellants charge that constructing a campground and providing ORV access to the sand dunes would encourage further increase in ORV use, in violation of the "manner and degree" limitation set forth in section 603(c).

[1] Upon review of section 603(c), we agree with appellants that ORV use is not a "grandfathered use" which was expressly authorized by the statute. We disagree, however, that this fact establishes current ORV use as a violation of the Act. The thrust of section 603(c) is to require the Secretary to manage lands under review so as not to impair their suitability for preservation as wilderness. An exception to this nonimpairment standard applies to existing mining, grazing, and mineral leasing. These grandfathered uses may continue during wilderness review in the manner and degree in which they were being conducted on the date of approval of FLPMA, even if such uses would impair the suitability of the lands for wilderness designation. 1/

Appellants' assertion that only grandfathered uses may continue in a wilderness study area is simply inconsistent with the clear terms of section 603(c). Any nonimpairing use may occur, regardless of when that use commenced. Appellants further err in suggesting that the "manner and degree" of ORV use cannot increase during wilderness review. The "manner and degree" language of section 603(c) is expressly limited to existing mining, grazing, and mineral leasing. As appellants correctly observed, ORV use does not fall within one of these categories.

1/ In all cases, however, the Secretary is obliged to take any action required to prevent unnecessary or undue degradation. Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 745 (10th Cir. 1982).

BLM has concluded that ORV use in the WSA does not impair the suitability of the area for wilderness preservation, and appellants have proffered nothing which causes us to reverse that conclusion. Appellants state that ORV's cause "a change in dune morphology which directly influences dune stability and critical dune hydrology," but offer no support for this statement. Were we to accept this statement as accurate, the question remains whether any such change in dune morphology, stability, and hydrology would impair the area's suitability for preservation as wilderness.

Elsewhere in their statement of reasons (SOR), appellants state that "[i]t has been well documented in the scientific literature, for example, 'Effects of Off-Road Vehicles on Coastal Foredunes' by F. Anders and S. Leatherman, and 'Off-Road Vehicles on Public Land,' CEQ 1979, that ORV use does cause irreversible impacts to open dunes." Neither publication accompanies the SOR, however, and no attempt is made by appellants to describe how these articles might be relevant to inland dunes, such as those found in the Sand Mountain WSA. 2/

In response to appellants' argument, BLM submitted affidavits by Stewart L. Jacobson, outdoor recreation planner for the House Range Resource Area, and Gary Kocurek, associate professor of geological sciences, University of Texas at Austin. Each agrees with BLM's finding that ORV's do not permanently alter dune morphology, and that vehicle tracks are not evident following the next significant wind. Dune morphology is determined by the overall wind regime, sand supply, and climate (Kocurek affidavit, Jan. 30, 1989, at ` 2; see also Jacobson affidavit, Jan. 9, 1989, at ` 9). 3/

The above discussion of the effects of ORV use on the St. Anthony Sand Dunes disposes of appellants' argument that BLM should have prepared an environmental impact statement (EIS) prior to making its September 20, 1988, decision. An EIS is required by section 102(2)(C) of the National Environmental Policy Act, 40 U.S.C. | 102(2)(C) (1982), for major Federal actions significantly affecting the quality of the human environment. Having failed to demonstrate that BLM's decision will significantly affect the quality of the human environment, appellants cannot invoke the procedural requirements of section 102(2)(C).

Finally, appellants contend that BLM has failed to examine the impacts of ORV use on the WSA sand dunes and, specifically, on other forms of recreation in the WSA and on the Dunes Tiger Beetle, C. arenicola. As noted above, BLM prepared an EA which found that no significant impacts would result from its September 20, 1988, decision.

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2/ BLM's answer to appellants' SOR contains an affidavit by Fred J. Anders, one of the authors cited with approval by appellants. Anders states that the article he co-authored "has direct application only to dunes found in a coastal environment." According to Anders, application of his findings to interior dune fields, with either very different vegetation or no vegetation, would be inadvisable. 3/ Accord, affidavit of George W. Nelson, Jan. 13, 1989.

The EA acknowledges, however, that ORV's can impact the WSA by creating ways and trails. Id. at 1. Past uncontrolled access has caused a 4-mile network of trails in the WSA and has eliminated approximately 10 acres of vegetation. Id. at 1, 2, and 6. The impact resulting from litter, unregulated camping, and a 2-acre parking area is also acknowledged. Id. at 1, 2, and 4. As noted above, vehicle tracks in the sand are temporary in nature. Id. at 4.

Impacts of the proposed action on recreation (other than ORV use) are acknowledged in the EA. Most camping occurs in the vicinity of Egin Lakes, just outside the WSA boundaries, but some camping also occurs in the WSA. Id. at 7 and 8. The proposed action would shift present camping, with its associated litter, firewood cutting, and unsanitary conditions, to the campground that BLM intends to construct on the leased land. Id. at 7 and 8. An ORV funnel, allowing dune access only to all-terrain vehicles and motorcycles, is expected to curtail indiscriminate camping at Egin Lakes. Id. at 6.

In the concluding paragraph of the FONSI, the Area Manager expresses his view that "[b]ased on interim reports concerning the candidate species Dunes Tiger Beetle, there is no indication this [proposed] action would result in adverse impacts to the beetle population." Because this FONSI was issued approximately one week before BLM's final report on the Dunes Tiger Beetle, the EA does not reflect that report's findings. However, it is clear from appellants' pleadings that appellants have reviewed this final report (SOR, Nov. 21, 1988, at 3).

As more fully set forth in The Shoshone-Bannock Tribes, 108 IBLA 198 (1989), BLM's final report was prepared by Robert C. Anderson, professor and entomologist at Idaho State University. Dr. Anderson stated that adult beetles were found on all five dunes of the St. Anthony dunes complex. The occurrence of C. arenicola was found to be predictable, *i.e.*, given knowledge about its habits and habitat, specimens could easily be observed and collected. Other populations existed in Bannock, Bonneville, Jefferson, and Power Counties, though under some degree of human perturbation.

Based on this wider than previously known distribution of C. arenicola and the acknowledged fact of ORV traffic on the dunes for at least 10 years, <sup>4/</sup> the Area Manager concluded that the proposed action would not result in adverse impacts to the beetle population. Appellants' arguments calling for additional study of C. arenicola are unsupported by citation to statute, regulation, or case law.

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<sup>4/</sup> The dunes within the Sand Mountain WSA have been used by ORV enthusiasts since the early 1960's for motorized recreation. Over the past 11 years, since the wilderness review, ORV use of the dunes has increased (Affidavit of John A. Butz, Jan. 13, 1989, at ` 5 and 6).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Area Manager is affirmed.

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R. W. Mullen  
Administrative Judge

I concur:

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Franklin D. Arness  
Administrative Judge